In the Supreme Court

Appeal from the Michigan Court of Appeals and the
Third Circuit Court, Honorable Robert J. Colombo, Jr.

DESERAI LAWSON, Next of Friend of
ZHIMON BINGHAM, A Minor,

Plaintiff-Appellee

vs

KREATIVE CHILD CARE CENTER, INC.,

Defendant-Appellant

Supreme Court No: 130872
Court of Appeals No: 256388
Lower Court No: 03-314614-NO

130872

PLAINTIFF-APPELLEE'S BRIEF IN OPPOSITION TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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PROOF OF SERVICE

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COUNTER-STATEMENT IDENTIFYING ORDER APPEALED FROM AND RELIEF SOUGHT

This negligence action was brought on behalf of the Plaintiff's minor child, Zhimon Bingham, who was sexually assaulted by Freddie Marks when the Defendant-Appellant's employees negligently released Zhimon to his care. The issues presented in this appeal were originally heard before the Honorable Robert J. Colombo, Jr., of the Third Circuit Court, on the defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). At that time, the trial court granted summary disposition after concluding that "the Plaintiff has no substantively admissible evidence to demonstrate that the Plaintiff minor was sexually assaulted by Freddie Marks." (*Exhibit 1, Transcript of Defendant's Motion for Summary Disposition* at 15) The trial court's ruling was based upon its decision to exclude certain statements under the hearsay rule, MRE 801. *Id.*

Plaintiff-Appellee then appealed the trial court's order to the Court of Appeals. The Court of Appeals, in its written opinion of February 23, 2006, reversed the trial court. *(See Exhibit 2, Opinion of Court of Appeals* at 1) The court found that the evidence was admissible pursuant to MRE 803(4) and concluded that:

> the statement of a parent of a minor child who is clearly providing information for the purpose of obtaining medical treatment, especially where the child may not be capable of effectively communicating the information personally, should be admitted.

(*See Exhibit 2* at 4). The court further clarified its earlier decision in *Cooley v Ford Motor Company,* 175 Mich App 199; 437 NW2d 638 (1988), and held that "[i]dentification of a sexual assailant is medically relevant and therefore the *kind* of statement admissible under MRE 803(4)." *See Exhibit 2* at 3.

Thereafter, the defendant filed its current application for leave to appeal or, in the alternative, peremptory reversal. Plaintiff-Appellee respectfully requests that the application for leave to appeal be denied as this is not an issue that requires further consideration by this Court. Defendant-Appellant has failed to show that the Court of Appeal's decision was clearly erroneous and will cause material injustice, that the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals, or any other ground recognized by MCR 7.302(B). The Court of Appeals carefully considered the evidentiary issues in light of the current case law and reached a conclusion that is well supported and consistent with meaning and purpose of MRE 803(4). Plaintiff-Appellee further requests that this Honorable Court deny the Defendant-Appellant's request for peremptory reversal as the Defendant-Appellant has failed to state any error committed by the lower courts that is so manifest as to warrant immediate reversal.

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. IS THE PLAINTIFF'S MINOR'S IDENTIFICATION OF FREDDIE MARKS AS THE PERPETRATOR OF THE SEXUAL ASSAULT ADMISSIBLE AS SUBSTANTIVE EVIDENCE TO DEMONSTRATE THAT THE PLAINTIFF'S MINOR WAS SEXUALLY ASSAULTED BY FREDDIE MARKS?

Plaintiff-Appellee says:	"Yes"
Defendant-Appellant says:	"No"
The Trial Court said:	"No"
The Court of Appeals said:	"Yes"

II. IS THE ISSUE OF THE DEFENDANT'S DUTY TO PROTECT THE PLAINTIFF'S MINOR FROM THE MISCONDUCT OF FREDDIE MARKS AN ISSUE PROPERLY BEFORE THIS COURT?

Plaintiff-Appellee says:	"No"
Defendant-Appellant says:	"Yes"
The Trial Court said:	Nothing as the issue was not before it.
The Court of Appeals said:	Nothing as the issue was not before it.

COUNTER-STATEMENT OF FACTS

Defendant-Appellant Kreative Child Care, Inc., is a daycare center located at 9226 Kercheval in the City of Detroit.[1] On September 19, 2001, Plaintiff-Appellee Deserai Lawson enrolled her then two-year old son, Zhimon Bingham, in Defendant-Appellant's daycare center. *Id.* at 73. At the time of enrollment, Plaintiff-Appellee completed and signed a "Child Information Record" listing the names and telephone numbers of individuals whom were authorized to pick Zhimon up from daycare. *(See Exhibit 4, Child Information Card)* **Defendant-Appellant admits that only a parent is authorized to designate the individuals who can pick up a child from daycare.** *See Exhibit 3* at 51.

On or about April 24, 2002, Plaintiff-Appellee contacted Defendant-Appellant's daycare center and informed its employees that she would be leaving town and that Nicki Lawson (her stepsister) would be dropping Zhimon off and picking him up from daycare. (*See Exhibit 5, Deposition of Deserai Lawson* at 42*)* Defendant-Appellant consented to this authorized transfer. *Id.*

On April 25, 2002, Nicki Lawson dropped Zhimon off at Defendant-Appellant's daycare center. (*See Exhibit 3* at 90-91) During the course of the day, Nikki Lawson contacted Defendant-Appellant's employees and informed them that she was unable to get off of work and that she was sending her brother, Freddie Marks, to pick Zhimon up from daycare. *Id.*

Freddie Marks (a/k/a Sean Elliot, a/k/a Keishon Johnson, a/k/a Freddie Larkens, a/k/a Freddie Lawson) is a three-time convicted criminal and, at the time of this incident, had recently been

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[1] *See Exhibit 3, Deposition of MaLinda Perdue* at 38.

released from jail. (*See Exhibit 6, Deposition of Freddie Marks* at 62-65) **Freddie Marks is also HIV positive and an admitted homosexual.** (*See Exhibit 6* at 66)

On April 25, 2005, at approximately 2:45 p.m., Freddie Marks picked Zhimon up from Defendant-Appellant's daycare. (*See Exhibit 3* at *96)* Defendant-Appellant's employees released Zhimon to Freddie Marks even though Deserai Lawson had not authorized this transfer. Defendant-Appellant's employees released Zhimon to Freddie Marks even though they had the telephone numbers of at least four other individuals on Zhimon's Child Information Record that were authorized to pick the child up. *Id.* at 92. No one from Defendant-Appellant's daycare bothered to contact the individuals on Zhimon's Child Information Card to confirm this unauthorized transfer prior to releasing Zhimon to Freddie Marks. *Id.* at 93

After picking Zhimon up from daycare, **Freddie Marks sexually assaulted Zhimon.** Freddie Marks sucked Zhimon's penis and inserted his finger up Zhimon's rectum. *See Exhibit 5* at 49.

On April 29, 2002, while drying Zhimon off after a bath, he complained: **"Mom, my butt hurts."** *See Exhibit 5* at 48. When Plaintiff-Appellee inquired as to why his butt hurt, Zhimon responded "**Uncle Fred check out my butt.**" *Id.* Zhimon further demonstrated, with the use of teddy bears, that oral sex had also been performed on him. *Id.* at 49

On April 30, 2002, Plaintiff-Appellee presented Zhimon to the emergency room at Children's Hospital for the purposes of medical treatment. *(See Exhibit 7, Medical Records of Children's Hospital)* A history was provided to the physicians that Zhimon had been sexually molested by Freddie Marks, who was HIV positive. *Id.* Zhimon complained of pain in his rectum. *Id.* Zhimon was then interviewed by an emergency room physician and an AIDS social worker. *Id.* Given the

likely exposure to HIV, the physician started Zhimon on a multi-drug HIV therapy consisting of Ziagen, Kaletra and Zerit. *Id.* Zhimon was also tested for HIV. *Id.* Plaintiff-Appellee was further advised that Zhimon should follow-up with the Immunology Clinic. *Id.*

As instructed, Zhimon treated with the Immunology Clinic for his HIV exposure. (*See Exhibit 8, Medical Records of Immunology Clinic)* A history was provided of Zhimon being sexually molested by Freddie Marks, who is HIV positive. *Id.* The physicians continued Zhimon on a series of HIV medications. *Id.* Zhimon was treated for approximately six weeks. *Id.* Along with the medication, Zhimon was also subjected to multiple HIV/DNA tests in an effort to determine whether he had contracted the disease from Freddie Marks. *Id.*

Zhimon was further treated at Grace Hospital for sexual assault counseling. *(See Exhibit 9, Records of Grace Hospital)* Zhimon was treated by a therapist for possible sexual overtures and/or anger issues. *Id.* The therapist was provided with a history of the incident with Freddie Marks. Plaintiff-Appellee and Zhimon participated in approximately five (5) sessions. *Id.*

ARGUMENT

I. THE PLAINTIFF'S MINOR'S IDENTIFICATION OF FREDDIE MARKS AS THE PERPETRATOR OF THE SEXUAL ASSAULT IS ADMISSIBLE AS SUBSTANTIVE EVIDENCE TO DEMONSTRATE THAT THE PLAINTIFF'S MINOR WAS SEXUALLY ASSAULTED BY FREDDIE MARKS.

A. Standard of Review

The decision to admit or exclude evidence is reviewed for an abuse of discretion. *Waknin v Chamberlain,* 467 Mich 329, 332; 653 NW2d 176 (2002). However, to the extent that an issue requires an examination of the meaning of an evidentiary rule, the Court reviews such issues *de novo* as the issue involves a question of law. *Id.* citing *CAM Construction v Lake Edgewood Condominium Ass'n,* 465 Mich 549, 553; 640 NW2d 256 (2002).

B. Analysis

Leave to appeal is not necessary in this case. The issues appealed were properly resolved by the Court of Appeals. Defendant-Appellant has failed to show that the Court of Appeal's decision was clearly erroneous and will cause material injustice, that the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals, or any other ground recognized by MCR 7.302(B).

At issue in this appeal are statements involving multi-hearsay, or hearsay within hearsay. As this Court is aware, "in order for such hearsay within hearsay to be admissible, each part of the combined statement must conform with an exception to the hearsay rule." *Cooley v Ford Motor Company,* 175 Mich App 199, 203; 437 NW2d 638 (1988)(citation omitted) Here, the trial court erred in its determination that Plaintiff-Appellee could not conform each part of the combined statement with an exception to the hearsay rule. However, the Court of Appeals properly reversed

the trial court after finding that Plaintiff-Appellee had conformed each statement with an exception to the hearsay rule. In doing so, the Court of Appeals corrected the trial court's misreading of *Cooley, supra* so that it is clear that the identification of a sexual assailant is medically relevant and therefore admissible. Consequently, the issues presented in this application have been resolved and do not require further review by this Court. Defendant-Appellant's application for leave to appeal should be DENIED.

At issue in this case are statements that show that Freddie Marks sexually assaulted Zhimon Bingham, Plaintiff's Minor, in April of 2002. These statements are hearsay in that they are statements "other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *See* MRE 801(c) and *Merrow v Bofferding,* 458 Mich 617, 626; 581 NW2d 696 (1998). However, each of these statements are admissible because they conform with an established exception to the hearsay rule. *See* MRE 802 & *Merrow, supra* at 626. For example, the first statement at issue was made by Zhimon to Plaintiff-Appellee on April 29, 2002, while she was drying him off in the bathtub: "**Mom, my butt hurts**." This statement is admissible under MRE 803(3), which reads:

> (3) Then Existing Mental, Emotional or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical conditions (such as intent, plan, motive, design, metal feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will

The admissibility of this statement, under MRE 803(3), was recognized by both the trial court and the Court of Appeals. (*See Exhibit 1* at 5 and *Exhibit 2* at 2).

The next statements at issue are Zhimon's statement to Plaintiff-Appellee that "Uncle Fred

checked out my butt." and Plaintiff-Appellee's statement to the doctors that Zhimon was sexually molested by Freddie Marks. These statements are admissible pursuant to MRE 803(4), which reads:

> (4) Statements Made for Purposes of Medical Treatment or Medical Diagnosis in Connection with Treatment. Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnoses and treatment.

The Court of Appeals held that the trial court erred in excluding these statements as they were statements made for the purpose of medical treatment. *See Exhibit 2* at 4. As this Court is aware, the supporting rationale behind the admissibility of statements under of MRE 803(4) is the reasonable necessity of the statement to the diagnosis and treatment of the patient and the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care. *Merrow, supra* at 629 citing *Solomon v Shuell,* 435 Mich 104, 119; 457 NW2d 669 (1990) Therefore, when analyzing a statement under MRE 803(4), the court should consider whether the statement is medically relevant and whether the statement is considered trustworthy.

Here, the identification of Freddie Marks as the sexual assailant was certainly medically relevant to providing Zhimon with the appropriate care and treatment. It was relevant because **Freddie Marks is HIV positive. Therefore, Zhimon required specialized care and treatment given the potential exposure to HIV**. The relevance of Freddie Marks as the sexual assailant was made abundantly clear by the treatment that Zhimon received at Children's Hospital and the Immunology Clinic. Zhimon was subjected to at least six weeks of HIV medications and several HIV/DNA tests to determine if he had contracted the disease. These records certainly indicate that the identification of Freddie Marks was "reasonably necessary to such diagnoses and treatment."

MRE 803(4)

Furthermore, these statements carried with them the inherent indicia of trustworthiness that is necessitated by MRE 803(4). In reversing the trial court, the Court of Appeals recognized that MRE 803(4) does not require that the declarant provide the statement. *See Exhibit 2* at 4. As noted by the Court of Appeals, MRE 803(4) is written with a passive voice that "does not explicitly require that the statement be made by the individual seeking medical treatment or diagnosis." *Id.* Consequently, the issue then becomes whether a "third party's statement to a doctor, in the pursuit of obtaining medical care for someone else, can ever satisfy the inherent reliability prong." *Id.* at 3. Under the facts of this case, the Court appropriately concluded that a parent's statement to a doctor in pursuit of obtaining medical care for her two-year old son who had recently been exposed to HIV did satisfy the reliability prong of MRE 803(4). *Id.* at 4.

It is important to remember that Zhimon was merely two years old at the time of this incident. He communicated the pain in his rectum and the cause of that pain to his mother. He relied, as would any small child, upon his mother to make the proper decision to obtain medical treatment. Plaintiff-Appellee in turn acted upon the information communicated to her by Zhimon to obtain the specialized treatment that her son required but could not himself communicate because of his tender years.

As the Court of Appeals observed, "it is counterintuitive to presume that a parent would not feel the same interest in telling the truth to his or her child's doctor if the child is unable to do so." *Id.* at 4. Zhimon was two-years old. He was unable to effectively communicate to his physicians the incident involving Freddie Marks. He depended upon his mother, Plaintiff-Appellee, to provide the information necessary to obtain the proper treatment for his HIV exposure. Therefore, these

statements are admissible; Plaintiff-Appellee was able to conform each statement to a recognized exception to the hearsay rule. *Cooley, supra*

Lastly, Defendant-Appellant has raised, for the first time, the admissibility of the medical records generated during Zhimon's care. It is Defendant-Appellant's contention that these records are inadmissible hearsay pursuant to MRE 801. However, Defendant-Appellant ignores the precedent of this Court which found that medical records are admissible under MRE 803(6), which states:

> (6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

See Merrow, supra at 626-27. The admissibility of medical records has routinely fallen with MRE 803(6) when the proper foundational requirements have been satisfied. *Id.* This case is no different. Plaintiff will be able to establish the necessary foundational requirements for the admission of these medical records. Defendant-Appellant's argument that Plaintiff's minor's medical records are inadmissible is simply a meaningless attempt to further complicate the evidentiary issues in this case. Furthermore, any issue involving the admissibility of these medical records was not presented to or decided by the trial court or the Court of Appeals and, therefore, was not properly preserved for review by this Court. *Hines, infra.*

II. THE ISSUE OF THE DEFENDANT'S DUTY TO PROTECT THE PLAINTIFF'S MINOR FROM THE MISCONDUCT OF FREDDIE MARKS IS NOT AN ISSUE PROPERLY BEFORE THIS COURT.

A. *Standard of Review*

There is no applicable standard of review as the issue raised by the Defendant-Appellant was neither presented to or decided by the trial court. *Hines, infra.*

B. *Analysis*

Defendant-Appellant has not properly preserved for appellate review the issue of its duty to protect Plaintiff's minor from the misconduct of Freddie Marks. **This issue was not properly preserved because it was not an issue presented to or decided by the trial court or the Court of Appeals.** *See Hines v Volkswagen of America, Inc,* 265 Mich App 432, 443; 695 NW2d 84 (2005) citing *Peterman v Dep't of Natural Resources,* 446 Mich 177, 183; 521 NW2d 499 (1994), *Cf Fowler v McQuigg,* 222 Mich 178, 180; 192 NW 708 (1923) (citations omitted) wherein Justice Bird stated: "We have often indicated our refusal to pass upon questions not presented to or decided by the lower court."

Here, Defendant-Appellant seeks to have this Court grant leave to appeal on an issue that was not decided by the trial court or the Court of Appeals – this is improper. This issue was never raised at the trial court. *(See Exhibit 10, Defendant's Motion for Summary Disposition pursuant to MCR 2.116(C)(10), the supporting brief, and Defendant Reply to Plaintiff's Response to Motion for Summary Disposition pursuant to MCR 2.116(C)(10))* Therefore, in light of the Defendant-Appellant's failure to properly preserve this issue for appellate review, Plaintiff-Appellee requests that leave to appeal also be DENIED as to this issue.

RELIEF REQUESTED

For the reasons stated above, Plaintiff-Appellee respectfully requests that this Court DENY Defendant-Appellant's Application for Leave to Appeal. Plaintiff-Appellee also respectfully requests that this Court DENY Defendant-Appellant's request for peremptory reversal.

Respectfully Submitted,

BLUM KONHEIM ELKIN & CEGLAREK

Date: April 26, 2006

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PROOF OF SERVICE

Stephanie Arndt says that on April 26, 2006, she served a copy of Plaintiff-Appellee's Brief in Opposition to Defendant-Appellant's Application for Leave to Appeal and this Proof of Service on counsel of record by placing the same in an envelope properly addressed to:

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and depositing the said envelope in the United States mail, postage thereon fully prepaid.

I hereby declare that the statement above is true to the best of my knowledge, information and belief.

Stephanie L. Arndt